AT&T

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July 17, 2002

Via Electronic Filing

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 Twelfth Street, S.W., Room TW-B204
Washington, DC 20554

Re: Notice of Ex Parte Presentation: Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc., And BellSouth Long Distance, Inc for Provision of In-Region, InterLATA Services In Georgia and Louisiana, CC Docket No. 02-35.

Dear Ms. Dortch:

Yesterday, Joan Marsh and I met with Tamara Preiss, Judith Nitsche, Vienna Jordan, Joshua Swift and Monica Desai of the Wireline Competition Bureau. We urged the Bureau to investigate BellSouth's Transmittal No. 637 nad used the attached document as an outline of our discussion. In addition, I have attached a copy of the recent North Carolina Utilities Commission Order and BellSouth's response in Docket No. P-55, Sub 1366.

Consistent with the Commission rules, I am filing one electronic copy of this notice and request that you place it in the record of the proceedings.

Sincerely,

Patrick H. Merrick

Attachments

cc: Tamara Preiss
Judith Nitsche
Vienna Jordan
Monica Desai
Joshua Swift

BELLSOUTH HAS ESTABLISHED A "GROWTH TARIFF" IN VIOLATION OF FCC RULES

- *LEC Pricing Flexibility Order* (FCC 99-206, 14 FCC Rcd 14,221, ¶¶ 134-135 (1999)) unequivocally prohibits growth discounts:

  > "Growth discounts refer to pricing plans under which incumbent LECs offer reduced per-unit access service prices to customers that commit to purchase a certain percentage above their past usage, or plans that offer reduced prices based on growth in traffic placed over an incumbent LEC's network. The Commission tentatively decided not to permit growth discounts in the *Access Reform NPRM*, because they create an artificial advantage for BOC long distance affiliates with no subscribers, relative to existing IXCs and other new entrants. The Commission also invited parties to comment on whether growth discounts would enhance the development of competitive access markets."
  >
  > "None of the parties supporting growth discounts explains why growth discounts enhance the development of competitive access markets. . . . <u>Without any affirmative benefit to growth discounts presented in the record before us, we have no basis for allowing such discounts.</u>" (citations omitted, emphasis added)

- On May 17, 2002, BellSouth filed Transmittal No. 637, introducing on

  > "one-day's notice, pursuant to BellSouth receiving Phase I Pricing Flexibility for Switched Access Services in qualifying . . . MSAs" its first switched access contract tariff.

- BellSouth's one-page D&J stated that its filing is a

  > "volume and term discount plan with a 60-month contract term."

- The following rate chart from BellSouth's tariff shows that BellSouth established a *growth* plan, rather than simply a "volume and term plan" as its D&J misleadingly characterized the offering.

Minimum Usage (MOU)	Usage Ranges (MOU)	Volume Discount Percentages				
		Year 1	Year 2	Year 3	Year 4	Year 5
3,385,697,632	3,385,697,632 – 3,453,411,585	7%	-	-	-	-
	>3,453,411,585 – 3,724,267,396	10%	15%	20%	-	-
	>3,724,267,396 – 4,401,406,922	15%	20%	25%	30%	35%

- This is a *growth* tariff:

  - To qualify for discounts, the IXC in Year 1 must exceed the minimum usage specified; in Year 2, it must exceed 102% of the minimum usage; and by Year 4, it must exceed 110% of the minimum usage.

  - BellSouth applies a discount to the revenue associated with minutes that exceed the minimum usage (*i.e.*, growth or incremental volumes up to 30% of the minimum usage) during the relevant year.

  - Although not specified in the tariff, BellSouth forecasts the annual volumes anticipated in the first year using an 18-month historical trend (linear regression), which becomes the IXC's minimum usage for the term of the contract.

- Growth tariffs are *unreasonably discriminatory*:

  - IXCs with *identical* traffic volumes will be paying disparate per-minute rates for switched access.

  - Why? The customer with increasing volumes will be able to take advantage of the growth discount plan whereas customers in a "no growth" or "declining trend" mode cannot obtain the discount.

  - Consequently, the effective per-minute switched access rate for customers with growth will be lower than the rate for customers with the same amount of traffic that do not exhibit growth.

- Under FCC rules, BellSouth's long distance affiliate will be able to take advantage of a contract tariff so long as it certifies that it provides service pursuant to that contract tariff to an unaffiliated customer. 47 CFR § 69.727(a)(2)(iii).

- FCC must take prompt action against BellSouth to eliminate the discrimination caused by its first switched access contract tariff, a *prohibited growth tariff*.

STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. P-55, SUB 1366

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of Tariff Filing by BellSouth Telecommunications, Inc. to Establish Contract Rates for Switched Access Rate Elements	)))	ORDER SUSPENDING TARIFF AND SEEKING FURTHER COMMENTS

BY THE COMMISSION: The proposed tariff, which was filed on May 24, 2002, is a special arrangement for a specific interexchange carrier (IXC) to be offered discounts of up to 35% over a five-year period on usage-sensitive and recurring revenue from various local switching and transport rate elements. Although this particular tariff provides contract terms for only one individual customer, BellSouth Telecommunications, Inc. (BellSouth) has committed to make similar contracts available to other IXCs. BellSouth discussed the contract offerings with other IXCs prior to filing the tariff.

AT&T initially raised some concerns over the proposed agreements because of the contract's heavy reliance upon growth in switched access minutes to provide the discounts and the anticipated effect of BellSouth Long Distance's market entry. To provide more time for discussion between BellSouth and AT&T of the Southern States, Inc. (AT&T), BellSouth voluntarily extended the tariff's effective date from June 6, 2002 to June 28, 2002. At the time this was written, the parties had been unable to reach an agreement on terms of a similar contract for AT&T.

The contract which is the subject of this filing requires the IXC to attain and maintain a 10% or greater growth in switched access minutes over a predetermined minimum usage level in order to be eligible for the maximum discount available under the contract. The larger percentage discounts are available only in the later years of the contract. If 110% of the minimum usage level is maintained in years one through five, the discount rises linearly from 15% discount in year 1 to 35% discount in year 5. No discount is provided in any year in which the switched access minutes do not exceed the minimum usage level. Lower percentage discounts are available in years 1 through 3 if the growth in switched access minutes is between 102% and 110% of the minimum usage level, but no discount is available in years 4 and 5 if the usage does not exceed the minimum usage level by 10% or more. At switched access usage levels greater than the minimum usage level but below 102% of the minimum usage level, only a 7% discount is available in year 1, and no discount is available in years 2 through 5. In all cases, the discount applies only to the eligible billing for usage in excess of the minimum usage level.

Although not specified in the tariff, the minimum usage level for this particular customer is based on the switched usage over an 18-month period prior to the agreement. This level is fixed for the life of the agreement.

While the Public Staff stated that it understands BellSouth's attempts to maintain or encourage growth in current levels of switched access usage, it is concerned about any anti-competitive effects the entry of BSLD would have on the other IXCs' ability to maintain or grow their switched access usage, and thus be eligible for discounts under similar contracts. Under the terms that BellSouth intends to apply for establishment of the minimum usage level, BellSouth must be in the market 18 months prior to entering into a similar contract. While its usage would grow strongly during the first portion of that period, the usage would likely flatten during the latter half. The method used by BellSouth to determine the minimum usage level would incorporate all of this usage into a linear regression which would be used to extrapolate the usage expected for the next twelve months. The usage results for those twelve months would become the minimum usage level for the term of the contract.

The Public Staff has concluded that the 18-month period and the linear regression methodology which BellSouth would use for the establishment of the minimum usage level would tend to reduce the advantage or disadvantage that a new entrant, such as BSLD, would have, relative to the other service providers, in meeting the growth requirements of the contract. While other providers would have a disadvantage in attaining any growth in switched usage during the period immediately after BSLD enters the market, that period of negative growth for those carriers could eventually be used as part of the 18-month period used by BellSouth's methodology to establish a negative trend in usage that would translate to a lower than otherwise minimum usage level. Thus the BellSouth entry could be used to establish favorable contract terms for other providers after BellSouth's entry. This presumes that there will be an offering of this kind at that time, which is not guaranteed by the tariff as filed.

This matter came before the Regular Commission Staff Conference on June 24, 2002. The Public Staff stated that it believes that the tariff offers advantages to both BellSouth, in the form of continued or increased demand for switched access services, and the IXCs, in the form of reduced access costs, and that there is some potential for end users to benefit as a secondary result. The Public Staff believes that if the tariff is allowed to become effective under the conditions that we have discussed, no party will be adversely affected.

The Commission's approval of the tariff should therefore be conditioned upon:

1. non-discriminatory offering of similar agreements to all IXCs;

2. continuation of the offerings at least 24 months beyond the date of BSLD's entry into the North Carolina interLATA long distance market;

3. systematic reliance upon the 18-month historical period and linear regression methodology to derive the minimum usage level for the next 12 months; (This means among other things that BSLD would not be eligible for the contract rates for at least 18 months after entry into the North Carolina interLATA market.); and

4. neither the tariff nor the contracts enable BellSouth to violate the provision of its Price Plan which requires that no service be made available at below its long run incremental cost.

These conditions should be either incorporated into a generic portion of the tariff or included as part of the Commission's order addressing the matter.

Other Comments

Mr. Burley Mitchell, representing AT&T, noted that AT&T had filed a complaint in Docket No. P-55, Sub 1365, arguing that the proposal was discriminatory and anti-competitive, especially as applied to AT&T. He argued that there needs to be more clarity ad specificity in the proposed tariff and suggested that the Commission should wait until the complaint is ruled upon.

Mr. Jeff King of AT&T noted adverse effects on a declining switched access IXC the conditions proposed by the Public Staff mainly intend to deal with BSLD.

Mr. Ralph McDonald representing WorldCom, Inc., echoed AT&T's concerns and recommendations.

Mr. Marcus Potter of Carolina Telephone and Telegraph Company supported the Public Staff's recommendations. Many declines in switched access minutes of use are examples of conscious corporate strategies. The proposal may also help to ameliorate some problems involving misstated percentage intrastate use (PIU).

Mr. Robert Kaylor, representing BellSouth, urged action without delay. Mr. Terry Hendrix with Mr. Ed Matajic of BellSouth responded to Commission questions. They argued that toll access was now a competitive market and discounting was a necessary incentive. Ms. Linda Cheatham of BellSouth said that this was a contract service arrangement outside the Price Plan, although it was being handled as a tariff matter.

WHEREUPON, the Commission reaches the following

CONCLUSIONS

After careful consideration, the Commission concludes that good cause exists to suspend the proposed tariff for a period of 45 days from June 28, 2002, to August 12, 2002; that AT&T, BellSouth, and the Public Staff confer together with a view toward arriving at a mutually agreeable solution by no later than July 5, 2002; and that, if such discussions are not fruitful, file further comments and argumentation according to the following schedule:

1. By BellSouth, by no later than July 16, 2002

2. By AT&T, the Public Staff and any other intervenor, by no later than July 25, 2002

The primary reason for the Commission decision is that the Commission believes that this matter is of significance in a changing regulatory and economic environment and ought to be decided on a more deliberate basis than that afforded at Commission Conference. At the same time, the Commission believes the matter can be dealt with more expeditiousness than the time-frame proposed by AT&T.

Lastly, the Commission notes that AT&T has filed a complaint in Docket No. P-55, Sub 1365. Since this complaint is of the same general subject matter as the agenda item, the complaint will be held in abeyance pending resolution of the agenda item.

IT IS, THEREFORE, SO ORDERED.

ISSUED BY ORDER OF THE COMMISSION.

This the 25th day of June, 2002.

NORTH CAROLINA UTILITIES COMMISSION

Geneva S. Thigpen

Geneva S. Thigpen, Chief Clerk

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July 16, 2002

FILED

JUL 16 2002

Clerk's Office
N.C. Utilities Commission

Ms. Geneva S. Thigpen
Chief Clerk
North Carolina Utilities Commission
4325 Mail Service Center
Raleigh, NC 27699-4325

Re: Docket No. P-55, Sub 1366

Dear Ms. Thigpen:

I enclose for filing in the above-referenced docket the original and 31 copies of BellSouth's Comments. I am also enclosing an extra copy of this letter which I would appreciate your stamping "Filed" and returning to me in the usual manner.

Thank you for your assistance in this matter.

Sincerely,

Edward L. Rankin, III

Edward L. Rankin, III

ELR:jt

Enclosures

cc: All Parties of Record

AG
Bennink
Lons
Hoover
Sessoms
Kite
Steel
Paschal
Wisdom
Gruber
legal.3
acct.3
EcRes.2
Tele.3

BEFORE THE

NORTH CAROLINA UTILITIES COMMISSION

In the Matter of:

Tariff Filing by BellSouth Telecommunications, Inc. to Establish Contract Rates for Switched Access Rate Elements	)))	Docket No. P-55, Sub 1366

BELLSOUTH'S COMMENTS

BellSouth Telecommunications, Inc. ("BellSouth"), hereby files, pursuant to the Order Suspending Tariff and Seeking Further Comments, issued June 25, 2002, its Comments in support of the subject Tariff, and states the following:

1. The subject Tariff is the product of negotiations between BellSouth and Sprint. However, BellSouth has filed this switched access offering as a Tariff that would be available to provide discounts to all interexchange carriers ("IXCs") who choose to take advantage of this offer. Contrary to the assertions of AT&T, this Tariff is in no way discriminatory. Instead, this Tariff creates a discount of the otherwise available prices for switched access services on the basis of both the volume of services used and the increase in the volume of services used, and this discount is available to every IXC. Any similarly situated IXC can avail itself of the exact same discount.

2. The Tariff, and the subject discount proposal incorporated therein, must be considered in the context of the current market for switched access services. In the past two years, the price of switched access services in North Carolina has declined dramatically. In its Order Regarding Joint Stipulation (entered in Docket Nos. P-55, Sub 1013, and Sub 1161 and P-100, Sub 72 on July 24, 2000), the Commission approved the stipulation of BellSouth, AT&T and other parties to reduce switched access rates over a period of time from $.063 per minute to

\$.02 per minute. As the Commission noted in that Order, BellSouth and AT&T submitted a Brief and Proposed Order in which they stated jointly that this reduction "will make North Carolina's access rate among the lowest in the BellSouth region . . . (Order Approving Joint Stipulation, p. 9).

3. At the same time, IXCs have available to them an unprecedented array of alternatives to purchasing switched access services. Of course, special access arrangements have long been available, and continue to be so. Beyond this, an increasing number of IXCs are providing long distance service by obtaining access either through the use of their own facilities or the facilities of carriers other than BellSouth. It is for this reason that in February of 2001, the FCC granted BellSouth pricing flexibility in the offering of certain switched access services.[1] Given the declining price of switched access service, and the increasing availability of competitive alternatives, BellSouth attempted--first, in its original negotiations with Sprint and more generally with this Tariff--to provide a financial incentive to IXCs to not only purchase switched access service from BellSouth, but to increase the amount of these purchases.

4. Again, although this Tariff grew out of negotiations with Sprint, it is available to any similarly situated IXC. Moreover, it is structured so that the benefits to carriers (i.e., the inducement to increase their purchase of switched access from BellSouth) will be available to all. Specifically, BellSouth has set the discount so that the greater the percentage of the increase over the baseline usage (which is set according to a formula that will be discussed below), the greater the discount. Setting the discount based, in part, upon the percentage of increase allows <u>both</u> large and small IXCs to benefit financially from increasing the amount of service that they purchase from BellSouth. That is, even a small IXC that is unable to purchase switched access

[1] Memorandum Opinion and Order, released February 27, 2001, FCC 01-76, Docket (CB/CP) No. 00-21 ("Pricing Flexibility Order").

in very large volumes can obtain a discount by increasing proportionately the amount of its purchases.

5. AT&T's contention that this Tariff is discriminatory is completely groundless. First, AT&T claims generally that this Tariff will discriminate against it as a large IXC. This contention is incorrect. The Tariff would base the discount on (1) the percentage of increase in services purchased multiplied by (2) the volume of services purchased (i.e., to the extent the purchased usage exceeds the baseline usage). Thus, if two IXCs increase their respective switched access usage by the same proportion, the IXC with the greater volume purchased will receive a greater discount.

6. AT&T has also argued that this Tariff is discriminatory because it will necessarily be unavailable to AT&T. Apparently, this contention is based on the fact that the volume of switched access services that AT&T has purchased from BellSouth in recent years has declined. However, this contention, too, is wrong. As described in the Tariff, discounts are given over the five year course of the contract based on the percentage of incremental increase in use beyond the baseline usage (Tariff, Original, p. 3). The baseline usage is determined by looking at the purchasing trend of the IXC over the past eighteen months and projecting this trend forward for the next twelve months. The discount is then based upon the percentage by which the IXC exceeds this baseline usage.

7. Thus, an IXC that has purchased switched access service from BellSouth in increasing amounts over the past eighteen months would have a baseline usage that would reflect a projected increase over the next year, i.e., its baseline usage for discount purposes would be higher than its current usage. If, however, a given IXC's purchase of switched access from BellSouth has declined over the past eighteen months, then this would be projected forward for

the next twelve months in order to arrive at a baseline usage figure that would be lower than the current usage. Thus, to obtain a discount in the first year, that IXC would simply need to maintain its current usage. Thus, the formula, if anything, would benefit the IXC whose purchase during this eighteen month has declined, but that purchases more switched access from BellSouth in the future, i.e., the IXC that exhibits the future purchasing decisions that the Tariff is intended to encourage.

8. Beyond this, AT&T's argument that the discounted Tariff offering is discriminatory appears to be based on its belief that the discount will be permanently unavailable to AT&T because AT&T's purchase of switched access service from BellSouth will decline perpetually. AT&T also seems to imply not only that this result is a given, but that this result is entirely outside of AT&T's control. The contention, however, could only be true if two factors existed: (1) if AT&T is currently purchasing the absolute maximum amount of switched access from BellSouth that it can purchase (i.e., if it is eschewing all other alternatives), and (2) if AT&T is so doomed to fail in the future competition for long distance customers that AT&T's need for access to serve these customers will unavoidably decrease. AT&T has certainly not represented in the context of this proceeding that either of these limiting factors exists.

9. In reality, the situation is simply that if AT&T anticipates that the amount of switched access that it purchases from BellSouth will decline in the future, then this is because AT&T has made a business decision to pursue other alternatives for access (and/or foresees only future market failures). Thus, AT&T's allegation that the Tariff is discriminatory is really nothing more than a complaint that BellSouth has not proposed a discount that suits AT&T's desire to both use BellSouth's switched access service less in the future and receive a discount on the declining amount of switched access that it does purchase. Again, the purpose of this Tariff

is to provide an incentive for IXC customers to remain on BellSouth's network and to increase their usage of BellSouth's switched network to serve their long distance customers. It is perfectly legitimate (in fact, "just and reasonable") for BellSouth to create this incentive for IXCs through the subject Tariff. If AT&T does not care to take advantage of the offered discount, this in no way renders the Tariff discriminatory. AT&T's decision should also not provide a basis for it to prevent Sprint (or any other similarly situated IXC) from accepting the offer.

10. In granting BellSouth's request for pricing flexibility, the FCC set forth the requirement that flexible pricing plans entered into on a contract basis must be available <u>in addition</u> to the special access prices that would otherwise be available. (Pricing Flexibility Order, ¶ 6). This requirement is to ensure that no customer of the LEC "that has been granted [pricing] flexibility [will] be required to pay more than it would if the flexibility had not been granted." (<u>Id.</u>). BellSouth has complied with this requirement in its federal filings, and it has done the same in this case. Even if AT&T chooses not to take advantage of the discounts available through the subject Tariff, it will continue to be able to take advantage of the declining switched access rates that are currently in effect, and to which it has stipulated, as referenced above.

11. After BellSouth submitted this Tariff, the Public Staff proposed certain conditions upon the approval of this Tariff, which are set forth in the Order (pp. 2-3). BellSouth has agreed to these conditions.[2] In the Order, the Commission subsequently directed BellSouth and AT&T to attempt to resolve their differences regarding this Tariff. AT&T has made a discount proposal that, in the opinion of BellSouth, entails rejecting the fundamental basis of the discount plan,

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[2] It should also be noted that even if AT&T's concerns were legitimate, these concerns have largely been addressed by the Public Staff's proposed conditions, e.g., the requirement that the discount be made available to similarly situated IXCs (<u>See</u> Order, p. 2) addresses an issue that was raised in AT&T's Complaint (¶ 9).

and, instead, implementing a plan that would provide the greatest benefit to AT&T, while working to the disadvantage of its competitors, i.e., other IXCs.

12. Specifically, AT&T submitted to BellSouth a plan that would abandon the dual goals of retaining usage on the BellSouth network and inducing growth in the minutes of usage purchased by IXCs. Given the context in which AT&T's proposal was made, BellSouth does not consider it appropriate to reveal it in detail without the permission of AT&T. It will suffice to say, however, that the proposal by AT&T is such that AT&T would receive a tremendous benefit, while other competitive carriers having less volume of usage would receive substantially less benefit. Thus, AT&T has responded to BellSouth's attempt to develop a discount plan that would be available and useful to all carriers by proposing one that is entirely different in structure, and that is calculated to benefit AT&T disproportionately.

13. Although BellSouth believes that the Tariff should be approved as filed, if this Commission desires, BellSouth would be willing to withdraw the Tariff. If BellSouth did so, then it would agree to file its agreement with Sprint to this pricing plan as a contract service arrangement. By doing this, Sprint would have available to it the arrangement to which it and BellSouth have agreed, and any other similarly situated IXC that wishes the same arrangement could obtain this discount in the form of its own contract service arrangement with BellSouth. At the same time, BellSouth and AT&T could continue to attempt to negotiate some sort of a discount plan that would be acceptable to AT&T. If these efforts fail, then AT&T would certainly be able to pursue any appropriate procedural recourse at that time.

14. Again, BellSouth believes that the Commission should approve its Tariff. The Tariff is consistent with the rationale of the FCC's grant to BellSouth of pricing flexibility, it is a just a reasonable response to the current market for switched access services, it will provide a

potential benefit to all IXCs, and it is clearly not discriminatory. Thus, BellSouth's offer to withdraw the Tariff is not the course that BellSouth would prefer, but is only as an alternative to which BellSouth can agree if the Commission deems this approach appropriate.

WHEREFORE, BellSouth respectfully requests the entry of an Order approving the subject Tariff for the reasons set forth above.

Respectfully submitted, this 16th day of July, 2002.

BELLSOUTH TELECOMMUNICATIONS, INC.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served on parties of record by U.S. mail, this the 16th day of July 2002.

Jean Thomas

454059